

# The Chinese Takings Law from a Comparative Perspective

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When acquiring private property, governments may exercise one of three options: confiscation, consensual exchange, or eminent domain. Under the first approach, the government can confiscate private land without seeking consent from private owners and without paying compensation to them. Confiscation does not happen very often except under certain extraordinary circumstances, such as immediately after an outright revolution. The social costs resulting from confiscation are historically devastating. Alternatively, under the consensual exchange approach, the government can only acquire private property through arm's-length negotiations in an open market. It requires the government to obtain consent from private owners and pay mutually agreed purchase prices, determined by both the government as a willing buyer and private owners as willing sellers. When negotiations succeed, consensual exchange is almost always beneficial to both parties.<sup>1</sup> When negotiations fail, owners retain their properties and the government incurs costs without achieving its goal.

The third approach is through eminent domain, which denotes when the government can take private properties for "public use"

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1. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 78 (1986).

without owner consent.<sup>2</sup> The government can either use the threat of eminent domain to hasten “negotiations” or exercise its sovereign power to take properties outright and provide the owners compensation as set by third parties. These third parties usually consist of appraisal firms that calculate the amount of compensation based on market value.<sup>3</sup> Eminent domain proceedings, as typified by language in the Fifth Amendment of the U.S. Constitution,<sup>4</sup> require that: (1) the property must be for public use; and (2) the owner of the property must be provided with just compensation.

Theoretically, the government should only use eminent domain proceedings in situations that involve a bilateral monopoly problem.<sup>5</sup> For example, a bilateral monopoly exists when the government cannot complete a public project without acquiring a particular tract of land owned by a private party. The private owner, in realizing the unique bargaining power he or she possesses, can hold out until the government pays a price that far exceeds the property’s market value. As a result, exercising eminent domain power becomes necessary for the government to avoid paying more than “just compensation.” In practice, however, a government often remains the sole authority to interpret what constitutes a bilateral monopoly situation; in other words, the government gets to say how much is too much. In developing economies, such as China, governments rarely opt to use methods other than exercising eminent domain power because they regard almost all land acquisitions as situations involving bilateral monopoly. Most importantly, governments are convinced that using eminent domain power is the most efficient way to cut the costs for economic development.

In fact, the legitimate exercise of eminent domain power is by no means a free lunch. It can be very costly in jurisdictions where constitutional guarantees are fully respected. According to Thomas Merrill, the exercise of eminent domain involves at least five costs: (1) costs to lobby the legislature to grant eminent domain power; (2)

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2. *Id.* at 66

3. *See generally* 1-1A NICHOLS ON EMINENT DOMAIN § 1A.03 (1997).

4. U.S. CONST. amend. V (provides that no private property can be taken for public use without just compensation).

5. 3-10 NICHOLS ON EMINENT DOMAIN § 10.03.

procedural costs required by the Constitution, to include the drafting and filing of formal judicial complaints and service of process on the owners; (3) costs associated with professional appraisal services and providing for just compensation; (4) costs for the guarantee of condemnees' rights, to include public hearings on the condemnation's legality and the amount of compensation required; and (5) costs of litigation. Merrill terms these costs as the administrative costs of exercising eminent domain power, or due process costs.

There are two reasons why the administrative costs are essential for the efficient use of land resources and protection of private property. First, the administrative costs compel the government to more thoroughly reexamine its development plan as justified under an exercise of eminent domain. Substantial costs effectively force the government to search for other alternative means to complete its projects, such as purchasing land from an open market. If the government can reach the same goal at lower costs through genuine negotiations with private owners, the result would be beneficial to both sides. Additionally, these costs function as a buffer zone for private owners, to not be constantly harassed by unnecessary governmental takings. Second, the administrative costs provide an essential check on government power. By forcing the government to internalize the cost of takings, the administrative costs effectively prevent over consumption of property.<sup>6</sup> These costs have the effect of "disciplining the government, which would otherwise over expand unless made to pay for the resources that it consumes."<sup>7</sup>

The objective of this paper is to explore the correlations between the level of administrative costs and the likelihood of the abuse of eminent domain power. Part I traces the disparate treatment of private ownership of urban homes in China since 1949. It explains how and why the Chinese government dramatically changed its attitude towards private property due to varying ideological beliefs to which it subscribed at different times. Part II examines the serious problems

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6. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 725 (2005).

7. William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 269-70 (1988).

associated with the current takings law in China and provides a detailed analysis of the three elements of the takings law: public purpose, compensation, and due process of law. Part III briefly analyzes the takings laws of the United States and Singapore in comparison to China, who is not alone in facing the tension between the protection of private ownership and the need for further economic development. The purpose of the comparative analysis is to provide new perspectives into the debate about how China's takings law should be structured. This section also compares the administrative costs of takings among the three jurisdictions. Finally, the paper concludes that, among other reasons, the extremely low administrative costs of the exercise of eminent domain in China have substantially contributed to a massive abuse of eminent domain power.

#### I. THE FATE OF PRIVATE HOUSING IN CHINA

Takings is a non-issue in the absence of private ownership. Three decades ago, China faced few takings problems, because most urban real property was owned by the whole people, who "entrusted" their property to the government. As the *de facto* owner, the government had absolute power to use public property at will. Since the 1980s, the Chinese government gradually accorded private ownership of urban housing because it believed that private property rights were a driving force for economic growth. But the government soon began to take privately owned homes back and give them to commercial developers, whom it believed to be better suited for further economic expansion. In competition with the government-backed commercial developers, private property owners have consistently lost the battle to protect their property.

##### *A. The Impact of Marxism on Urban Housing in the 1950s*

China's early policy on private ownership of urban housing was based on Marx's *Das Kapital*.<sup>8</sup> According to Marx, private land

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8. Karl Marx, *Capital, Vol III* at chs. 21 and 46, Frederick Engels ed., Progress Publishers 1971 (1894), available at <http://www.marxists.org/archive/marx/works/1894-c3/>

ownership and private home ownership were different in nature and thus should be treated differently after the Proletarian Revolution. The reason that landowners were able to extract rent was merely because they occupied a piece of natural resource; the owner neither made significant contributions to improve his property, nor took any risk in generating profits from his land.<sup>9</sup> Private land ownership, therefore, served as the basis for pure exploitation.<sup>10</sup> Unlike private landowners, however, homeowners made substantial contributions to their properties. The rent income that homeowners received from tenants represented a return in the form of interest and amortization from their investments.<sup>11</sup> Accordingly, Marx stressed the elimination of private land ownership and the recognition of private home ownership after the Proletariat took power.

In formulating the early laws and policies on urban housing, the Chinese government followed the Marxist doctrine closely. On the eve of the establishment of the People's Republic of China, the government publicly responded to a question concerning the nature of private rental housing property in urban areas and how the government would deal with the homeowners. The reply, entitled Policy on the Nature of Urban Housing and Rent ("Housing Policy"), was published in The People's Daily on August 12, 1949.<sup>12</sup> In the Housing Policy, the government declared that urban housing was not a means of feudal exploitation and, therefore, should not be subject to confiscation. This policy was a tremendous relief to urban homeowners, as the government not only recognized the legitimacy of urban home ownership, but also delineated its understanding and application of Marx's theory regarding the distinction between rural land ownership and urban home ownership.

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9. *Id.* To illustrate his point on the differentiation between ground rent and house rent, Marx cited the testimony of Edward Capps (a big building speculator in London) before the Select Committee on Bank Acts of 1857. *Id.*

10. *Id.*

11. *Id.*

12. *Guanyu Chengshi Fangchan, Fangzu de Xingzhi he Zhengce* [Policy on the Nature of Urban Housing and Rent], PEOPLE'S DAILY (Beijing), Aug. 11, 1949, available at [http://bbs.procedurallaw.cn/topic.asp?TOPIC\\_ID=1464&ARCHIVE=](http://bbs.procedurallaw.cn/topic.asp?TOPIC_ID=1464&ARCHIVE=).

In the last part of the Housing Policy, the government went beyond (or even contradicted) Marx's theory by arguing that recognizing private ownership was the only way to motivate owners to maintain and increase housing supply.<sup>13</sup> Private investment was crucial to meeting increasing demand for housing, because the newly established government had no financial means to provide it.<sup>14</sup> The government acknowledged that some cities failed to observe the distinction between rural land and urban housing,<sup>15</sup> by either confiscating private housing or arbitrarily setting housing rent at extremely low levels. Without property protection, homeowners in those cities not only stopped maintaining current housing, but also stopped investing in building new houses. Consequently, the housing stock in those cities dwindled rapidly. Both homeowners and tenants suffered greatly from the radical measures.<sup>16</sup>

This line of analysis demonstrates that the government was still rational to the extent that it heeded the basic laws of economics about incentive and property rights at the early stages of the P.R.C. history. That consciousness, however, soon was replaced by the radical ideology that viewed any form of private property as capitalistic, a remnant that should be completely eliminated.<sup>17</sup>

*B. State—Managed Mandatory Leasing of Private Housing During Socialist Transformation (Jingzu)*

The promises in the *Housing Policy* were only kept for six years (1949–1955). When the government carried out this so-called “socialization,” it deemed private properties an obstacle to developing a socially-planned economy. Private housing was not an exception. In the 1950s, private housing accounted for the majority of urban housing in large cities such as Beijing and Shanghai. The government became concerned over the threat that the high

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Guanyu Chengshi Fangchan, Fangzu de Xingzhi he Zhengce [Policy on the Nature of Urban Housing and Rent], PEOPLE'S DAILY (Beijing), Aug. 11, 1949, available at [http://bbs.procedurallaw.cn/topic.asp?TOPIC\\_ID=1464&ARCHIVE=](http://bbs.procedurallaw.cn/topic.asp?TOPIC_ID=1464&ARCHIVE=).

proportion of private housing posed to the “socialization movement.” In 1955, concerned with the threat, the central government issued “The Opinions on the Current Situations on Private Housing and Opinions for Socialization” (“Opinions”).<sup>18</sup> Although the Opinions were in the form of government “red tape,” officials regarded them as an enactment to formulate local rules on private housing.<sup>19</sup>

Unlike the 1949 Housing Policy, the 1955 Opinions blamed private owners and real estate brokers for the increasing rental prices and shortage of housing construction. The main purpose of the Opinions was to set up minimum housing quotas that private owners were entitled to occupy. Any space beyond the minimum standard had to be rented out to the public at a state-set rate.<sup>20</sup> This method was called *jingzu*, the word for state-managed mandatory leasing. Under the proposed system, private owners were no longer free to decide how much or at what price to lease, despite the fact that they still legally retained ownership in their property. The government regulated and performed all leasing activities. In addition, the government confiscated empty lots and easements owned by private parties in urban areas.<sup>21</sup>

The government attributed the problems inherent in any real estate market to private homeownership. While the government did not abolish private homeownership all at once, to many homeowners, losing ownership was inevitable. After the Opinions were issued, real estate prices fell sharply, resulting in frantic housing sales. These frantic sales coupled with a lack of buyers, forced some owners to even demolish their houses and sell the wood and bricks for other construction use. As a result, the government simply did not achieve its goal for increasing housing supply.

Despite the negative impact that mandatory leasing brought to the housing market, local governments faithfully carried it out. In 1958, the Beijing government released detailed rules on mandatory leasing,

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18. Zhongyang Shujichu Dier Bangong Shi [Central Committee No. 2 Secretary Office], Guanyu Muqian Chengshi Siyou Fangchan Jiben Qingkuang Ji Jinxing Shehui Zhuyi Gaizao de Yijian [Current Situations on Private Housing and Opinions for Socialization], Jan. 18, 1955 (P.R.C.), available at <http://sh.focus.cn/newshtml/43563.html>.

19. *Id.*

20. *Id.*

21. *Id.*

and cities nationwide followed.<sup>22</sup> According to the rules, private homeowners were entitled to retain a base area of 15 rooms or 225 square meters for their own use or for private leasing. Any space beyond the base area was subject to mandatory leasing. Although the government did not take possession of private housing, it acted as an agent for private owners in exercising property rights such as entering into contracts with tenants and collecting rent. Private owners received 20% to 40% of the rent collected by the government.<sup>23</sup> In the process of carrying out mandatory leasing, some local governments deliberately reduced the base area in order to gain more control of housing units. In extreme cases, local governments disregarded the base area all together. In some cases, private owners were even required to pay rent for their own bedrooms.<sup>24</sup>

*C. Deprivation of Private Housing during the Great Proletarian Cultural Revolution*

While mandatory leasing seriously restricted private owners from exercising their property rights, private ownership was still legitimate, at least in theory. Owners were continuously paid nominal rent by the government for leasing their property to the public. When the Cultural Revolution broke out in 1966, however, the already abridged private property rights were destroyed completely. Acting upon the Red Guards' call for eradicating the remnants of capitalist enterprises, the State Council issued The Report on Several Questions Concerning Finance, Trade and Handicraft Industry ("Report") on September 23, 1966.<sup>25</sup> The Report declared that all public and private jointly managed enterprises were to be converted to state-owned

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22. CAO PEI, REAL ESTATE LAW IN CHINA 6 (1998).

23. *Id.*

24. Zhang Peng, *Bai Wan Hu Chengshi Zuwu, Chanquan Jiuzhang Chongfan* [Millions of Private Owners Lost Their Houses (During Socialist Transformation). Now is it Time for Them to Claim Property Rights?], JINJI [ECON. MAG.], Jan. 15, 2004, available at <http://finance.sina.com.cn/g/20040115/1108604474.shtml>.

25. Guanyu Caizheng Maoyi he Shou Gongye Fangmian Ruogan Zhengce Wenti de Baogao [Report on Several Issues on the Policies Regarding Finance, Trade, and Handicraft Industry] (promulgated by the Finance and Trade Office of the State Council and the State Economic Committee, Sept. 24, 1966), document number (1966) 507 (P.R.C.), available at [http://bbs.procedurallaw.cn/topic.asp?TOPIC\\_ID=1464&ARCHIVE=](http://bbs.procedurallaw.cn/topic.asp?TOPIC_ID=1464&ARCHIVE=).



enterprises. The state ceased paying dividends on private securities. Even though the Report did not address mandatory leasing, the state stopped payment of rent to private homeowners as well. Unlike the Housing Policy (1949) and Housing Opinions (1955), which laid out the rationale behind the government actions toward private housing, the Report offered no explanation for the actions. During the lawless period, the Red Guards publicly humiliated intellectuals, overseas Chinese, and Party members belonging to disgraced groups, and raided and confiscated their homes. The seized properties were either turned over to headquarters of “revolutionary organizations” or directly occupied by family members of the Red Guards. Because the Red Guards seized the legal system, there was no recourse for property owners to seek relief. Under intense political pressure, no one dared argue that housing was not a means of production and thus should be treated differently from capitalist industry and commerce. As one of the “achievements” of the Cultural Revolution, private homeowners were eliminated through violent means without any legal basis. By the end of the 1970s, urban housing was predominantly owned by the government.

#### *D. Public Housing and Housing Shortage*

Following the Soviet model, the government eventually monopolized its housing through socialization and became the sole provider of public housing.<sup>26</sup> As part of a wide range of social benefits, housing was allocated to workers with extremely low rents in urban areas. People living in rural areas, which made up approximately 90% of the total population, were excluded from the benefit of public housing.

The concept of allocated housing with a nominal rent sounded appealing to many people, especially to those who paid a considerable portion of their income for homes in the West. In reality, public housing was not only hard to obtain, but also of low quality, because the state viewed housing as a non-productive means that could not contribute to economic growth. “Putting production first, housing second” was a common political pledge everywhere

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26. Through confiscation, mandatory leasing, and takings.

from oil fields to industrial zones during the pre-reform era.<sup>27</sup> Thus, housing construction and maintenance were not the government's priority. As a result, the state, as the major source of housing development, was reluctant to increase production in the housing sector. The average living space per capita had dwindled from 4.5 square meters in 1949 to 3.6 square meters in 1979.<sup>28</sup> In addition to inadequate investment, the rapid population increase during this period also triggered a housing shortage.<sup>29</sup> It was not uncommon for two or even three generations of a family to live in one flat with less than three bedrooms.<sup>30</sup> The living conditions were intolerable in the overcrowded public housing. In order to create more space with limited state investment, designers had no choice but to leave out "luxury" items in residential housing. A survey in the early 1990s revealed that nearly 60% of public housing was not equipped with private toilets and kitchens due to the high cost of installation.<sup>31</sup> In summary, the problems associated with the pre-reform housing policy were a result of scarcity of supply, low standards, and poor maintenance.<sup>32</sup>

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27. SHIWEI CHENG, ZHONGGUO CHENGZHEN ZHUFANG ZHIDU GAIGE-MUBIAO MOSHI YU SHISHI NANDIAN [CHINA URBAN HOUSING SYSTEM REFORM: GOAL, MODEL AND DIFFICULTIES] at 5 (1999) [hereinafter Cheng]. This book is one of the most comprehensive sources in Chinese language that collects scholarly writings on China's public housing reform. According to this book, from 1958 to 1977, the state reduced housing investment substantially under the principle of "production first, housing second."

28. *Id.*

29. The pressure brought by the population increase on the planned economy was enormous. This explains the reason that the Chinese government put forth the controversial "population control" policy. For detailed discussion on the correlation between China's economic constraints and population growth, see generally Amy Hampton, Comment, *Population Control in China: Sacrificing Human Rights for the Great Good? Birth Control Surgeries: 1971-1986*, 11 TULSA J. COMP. & INT'L L. 321 (2003); Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51 (2000).

30. *Id.* In 1982, an estimated 1.89 million families with three generations shared space in flat units.

31. THE IMPACT OF CHINA'S ECONOMIC REFORMS UPON LAND, PROPERTY AND CONSTRUCTION 123 (Li Chen, Jean Jinghan & David Wills eds., 1999).

32. *Id.* at 122.

*E. Housing Reform and Private Ownership*

The traditional housing distribution system was neither fair nor cost-efficient, and was stretched to the brink of bankruptcy. Soon after general economic reforms began, the central government contemplated an overhaul of the public housing system. After experimenting in several middle-sized cities, housing reform was gradually carried out across the nation in the mid-1980s. Generally, the aim of the reform was to privatize public housing.<sup>33</sup> The privatization campaign, however, was not successful in the first phase of the reform. Despite prices being as low as one-third of construction costs, only a small number of workers were willing to purchase public housing. The failure of the reform was largely attributable to poorly defined property rights and the lack of a functional real estate market.

As reform progressed, ambiguous property rights began to emerge as a major legal hurdle for property sales. The government was reluctant to award full ownership of the housing purchased during the reform. When residents considered buying public housing, their primary concern was whether they could actually “own” (right to occupy, to use, to profit, and to dispose of) their homes.<sup>34</sup> For many, the appropriation of private property after liberation was a fresh memory. In the absence of explicit legal guarantees, it was difficult to convince workers to invest savings in purchasing homes. These concerns were not unreasonable. In the first phase of the reform, the practice of selling housing at a discounted price was largely curtailed.<sup>35</sup> For example, according to the Yantai model rules, workers who purchased public housing at a discounted price were

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33. For the development of housing reform, see YUN ZHIPING & BAI YIHONG, *ZHONGGUO ZHUFANG ZHIDU GAIGE* [CHINA HOUSING REFORM] (1990).

34. Cai pointed out that owners were more concerned about the right to dispose or profit than the right to use. He maintained that property ownership was the center of the reform. Without clearly defining property rights, it was impossible to set up the housing market. See CAI DERONG, *ZHONGGUO CHENGZHEN ZHUFANG ZHIDU GAIGE YANJIU* [STUDIES ON CHINA URBAN HOUSING REFORM] at 41–42 (1996).

35. *ZHONGGUO SHEHUI KEXUE YUAN CAIMAO YANJIU SUO*, MEIGUO NIUYUE GONGGONG GUANLI YANJIU SUO, [CHINA ACADEMY OF SOCIAL SCIENCE AND NEW YORK PUBLIC MANAGEMENT RESEARCH INSTITUTE], *ZHONGGUO CHENGZHEN ZHUFANG ZHIDU GAIGE* [CHINA URBAN HOUSING REFORM] 22 (1996).

only given the right to use and inherit it. They were not allowed to transfer, rent, give, or mortgage their homes. If it was necessary to sell, the housing was to be sold back to the original work unit at the purchase price less depreciation value.<sup>36</sup> These promises did not generate adequate incentives for residents to invest in housing.

The major rise in home sales came after the State Council issued The Decision on Deepening Urban Housing Reform in 1994.<sup>37</sup> According to the Decision, public housing was sold either at market price for high-income families or at prices based on construction costs for middle and low-income families. Workers who purchased housing at market price had full ownership of the housing, including the right to use, inherit, profit, and dispose of it. Workers who purchased housing at prices based on construction costs had limited ownership, which included the right to use and inherit and limited rights to profit from the housing. After five years from the purchase of a house based on the price of construction costs, the owner was allowed to sell it on the housing market as long as the land use fees and taxes were paid in full. Any proceeds from the sale were split between the owner and the work unit, which originally provided subsidies according to a predefined rate.<sup>38</sup> In sum, the higher the price paid at the time of purchase, the broader the ownership awarded. Such provisions on ownership were fair and pragmatic. To some extent, the Decision was modeled after the British Housing Act of 1981, which dealt with a similar situation in the process of privatizing public housing in the United Kingdom.<sup>39</sup>

The results of the housing and land reforms were profound. Both private homeownership and per capita living space increased dramatically. By the end of 2002, more than 72% of residential housing was privately owned.<sup>40</sup> By a different calculation, some

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36. Guowuyan Guanyu Shenhua Chengzhen Zhufang Zhidu Gaige de Jueding [State Council Decision on Deepening Urban Housing Reform] (1994) [hereinafter Housing Reform Decision], ST. COUNCIL GAZ. at 133 (P.R.C.). Based on this important guideline, local governments issued implementing rules.

37. *Id.* at 119.

38. Articles 14-2, Housing Reform Decision, ST. COUNCIL GAZ. at 135-36.

39. *See supra* note 35, at 29.

40. Ruan, *Zhongguo Chengzhen Jumin zhufang shuiping gaishan ren pingjun mianji chao 22 pingmi* [Urban Housing Improved, Space per Capita Reached 22 Square Meters].

scholars speculated that the actual number could be as high as 81.55% in 2004.<sup>41</sup> The average living space per capita in urban areas increased more than six times, from 3.6 square meters in 1979 to 23.7 square meters in 2003.<sup>42</sup> Among all the provinces and large cities (excluding Hong Kong and Taiwan), Shanghai residents enjoyed the largest living space per capita, which reached 29.35 square meters by 2003.<sup>43</sup> According to the same survey, Beijing ranked third, with an average living space of 24.77 square meters.<sup>44</sup>

#### *F. Urban Land Ownership and Land Reform*

As it remains today, the Constitution provides that the State owns all urban land and agricultural collectives own all rural areas. The Constitution does not entitle individuals to own land. Given that the State and collectives own all land in China, individuals who purchased housing during the housing reform have no rights to own or transfer the land underneath their homes. Land reform, therefore, had a particular importance to the success of housing reform and parallel land reform efforts were initiated in the early 1980s.<sup>45</sup>

The arrival of foreign investment, in conjunction with economic reform efforts, prompted land reform. To benefit from foreign investment, the State Council changed its traditional way of

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ZHONGGUO XIWEN SHE [CHINA NEWS], Aug. 1, 2003, available at <http://www.people.com.cn/GB/jingji/1038/1995500.html>.

41. 2004 NIAN DICHA NIAN DU BAOGAO FABU [2004 REPORT ON REAL ESTATE MARKET RELEASED], available at <http://www.people.com.cn/GB/jingji/1038/1995500.html>. Based on his calculation, Liu pointed out the figure of private housing could have been much higher than what the annual report indicated.

42. *Shehui baozhang baipi shu zi zhufang-ren pingjun zhufang mianji 23.7 pingmi* [White Paper on Social Security-Housing: Space per Capita Reached 23.7 Square Meters], GUOJI JINRONG BAO [Int'l Fin. Daily], Sept. 9, 2004, available at <http://news.sz.soufun.com/2004-09-09/320208.htm>.

43. Chen Xiaoping, *Shanghai renjun zhufang mianji da 29.35 pingfang mi ju neidi shouwei* [The Largest in the Nation: Space per Capita in Shanghai Reached 29.35 Square Meters], SHANGHAI QINGNIAN BAO [SHANGHAI YOUTH DAILY] Aug. 9, 2004, available at <http://sh.house.sina.com.cn/2004-08-09/9828.html>.

44. Xie Wei, *Beijing renjun zhufang 24.77 pingfang mi neidi ju disan* [Beijing Ranked Third; Its Housing per Capita Reached 24.77 Square Meters], XINJING BAO [NEW BEIJING DAILY], June 26, 2004, available at <http://house.focus.cn/newshtml/68231.html>.

45. *Zhonghua Renmin Gonghe Guo Tudi Guanli Fa* [Land Administration Law of the People's Republic of China (LAL)], art. 5.

allocating lands to State-Owned Enterprises (“SOE”) based on need. In 1980, the State Council issued its first piece of legislation on land use rights, which heralded the dramatic changes of the land administration system in China.<sup>46</sup> According to these Regulations, when Sino-foreign joint ventures applied for land, they were required to pay land use fees, regardless of whether the land was a new tract or an occupied tract that was already used by the Chinese partner. The fee included the cost of land surface readjustment, resettlement for laid-off workers, and other things such as easements and utilities. The land use fee could also be counted as a share of contribution from the Chinese partner to the joint venture. The land use rights were, however, not transferable.

The initial changes were inspiring, but foreign investors soon discovered that the non-transferable land-use right was inconvenient for business transactions. Local governments also complained about the difficulties in monitoring individual businesses after land-use rights were granted. In addition, the non-transferable requirement was conducive to black-market activities. To encourage foreign investment, a 1988 amendment to the Constitution addressed these concerns. A clause was added to Article 10 of the Constitution recognizing the legitimacy of transferable land-use rights. Revised article 10 reads:<sup>47</sup>

No organization or individual may appropriate, buy, sell or unlawfully transfer land in other ways. *The right to the use of land may be transferred in according with law.*

After the constitutional hurdle was cleared, the State Council enacted the Interim Regulations Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas, which set forth the scope and procedures for appropriating land-use rights and giving them to investors.<sup>48</sup>

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46. Guanyu Zhongwai Heying Qiye Jianshe Yongdi de Zanxing Guiding [Interim Regulations on Construction Land Use for Sino-Foreign Joint Corporations (joint ventures)] (1980).

47. XIAN FA art. 10 (1988) (P.R.C.) (emphasis added).

48. Zhonghua Renmin Gongheguo Chengzhen Guoyou Tudi Shiyongquan Churang he Zhuanrang Zanxing Tiaoli [Interim Regulations of the People’s Republic of China Concerning Assignment and Transfer of the Right to the Use of the State-owned Land in the Urban Areas]

Based on the principles of separating land-use rights from land ownership, the law extended land-use rights to companies, enterprises, organizations, and individuals within the territory of China.<sup>49</sup> This change meant, in addition to foreign investors, national economic entities and individuals were eligible to apply for land-use rights as well. Unlike previous laws, this law enabled land-use rights grantees to transfer, lease, and mortgage their rights within the duration provided by law.<sup>50</sup>

As this law persists, land-use rights are granted for a certain period of time according to different types of uses: for residential use, 70 years; for industrial use, 50 years; for Education, Science and Technology, Culture, Sports use, 40 years; and for commercial use, 50 years.<sup>51</sup> In general, the grantor (the state) does not have the right to reclaim the land-use right during the term of the grant; however, under special circumstances, such as public interest, the grantor may requisition the land-use rights through legal proceedings. If requisition occurs, the grantor must pay compensation based on the remaining time of the land-use right term and the grantee's investment in the land.

In sum, ideological changes eventually resulting in urban housing and land reforms provided residents legal standing to become real owners of their apartment homes. Yet, China's homeowners still do not own the land underneath their apartments. They only have the right to use the land for up to 70 years.

## II. BULLDOZING HOMES TO DEVELOP THE ECONOMY

Through housing reform, the government eagerly shifted the burden of providing housing from the state to individuals. Individual owners had indeed made substantial contributions to boost the

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(1990) [hereinafter ATLR]. The title of the law has been translated in several versions. The translation used in Randolph and Lou's Chinese Real Estate Law is "Interim Provisions for the Granting and Transfer of Land Use Rights on State Owned Urban Land." In order to keep the translation consistent with majority of works on land use rights in China, Beijing University Law School's translation is used here.

49. ATLR art. 3.

50. ATLR art. 4.

51. ATLR art. 12.

housing industry. A few years later, however, commercial developers emerged as a major force for economic growth. In addition, local governments began to rely heavily on commercial developers to take on urban renewal preferred “image projects,” such as gigantic squares and skyscrapers. As a result, new homeowners found that they were no longer in the government’s favor. In the conflict between individual homeowners and deep-pocketed developers, the government has consistently sided with the latter.

*A. Commercial Developers vs. Private Homeowners*

Initially, economic development led to a rapid growth in urban population and expansion of urban construction projects. The 1990s witnessed large-scale housing construction projects aimed at improving old urban districts across the country.<sup>52</sup> To make room for new developments, massive demolitions ensued. The demolition and relocation activities were chiefly managed and financed by the local governments. In Beijing, for example, the municipal government was responsible for the entire process of city reconstruction, from allocating funds, relocating residents, and setting compensation standards to providing resettlement housing. The initial purpose of demolition and relocation was to improve the living conditions of local residents.<sup>53</sup> As a result, residents gladly waited for government action to demolish their shabby flats, because they knew that they would eventually be moved into larger and better apartment homes. The public praised the government for its policy on urban reconstruction.<sup>54</sup>

Inevitably, however, the government’s funding of housing construction quickly dried up. During the economic reform, commercial developers stepped in to complete unfinished government projects after the state opened its land-use and housing markets. Toward the end of the 1990s, commercial developers played a prominent role in demolition and relocation activities. This change,

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52. Zhao Ling, *Chaiqian Shinian Beixi Ju* [Happy Endings Became Tragedies over Ten Years] NANFANG ZHOUMO [Southern Weekend], Apr. 14, 2004.

53. *Id.*

54. *Id.*



however, came with a heavy price tag for urban residents. Due to the lack of uniform laws, policies on demolition and relocation favored developers over residents. In order to cut costs and maximize returns, commercial developers were reluctant to provide residents with compensation and relocation arrangements after demolishing old houses. In terms of setting compensation standards and authorizing forced evictions, residents began to see the government siding with developers. The tension between residents and developers became a source of dissatisfaction. Consequently, the public's previously welcoming attitude became antagonistic towards demolition and relocation projects. In 1995, the Beijing government received a sharp increase of complaints filed by residents, whose houses were taken away without proper compensation.<sup>55</sup> In February 2000, 10,375 families together filed a class action lawsuit challenging the government's decision to demolish and relocate their homes, a surprise to the government at the time.<sup>56</sup>

### *B. The Chinese Takings Laws*

The tremendous harm inflicted on private owners can be traced directly to China's fast economic development. The tension between residents and developers has seriously affected social stability. In order to strike a balance between economic development and private property protection, Chinese lawmakers passed several laws to regulate government takings: (1) Article 13 of the Constitution; (2) Regulations on Urban Housing Demolition and Relocations, 2001 (Regulations); and (3) Urgent Notice on Diligently Carrying out Urban Housing Demolition and Relocation, and Maintaining Social Stability ("Notice").<sup>57</sup> Yet, despite the great importance that the

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55. *Id.*

56. *Id.*

57. Guanyu Renzhen Zuohao Chengzheng Fangwu Chaiqian Gongzuo, Weihu Shehui Wending De Jinji Tongzhi [An Urgent Notice on Diligently Carrying out Urban Housing Demolition and Relocation, Maintaining Social Stability], (promulgated by the Office of the State Council, Sept. 19, 2003). Guo Ban Fa Ming Dian [2003] no. 42. Urgent Notice (Jinji Tongzhi) is a type of normative document, which has no legally binding effect. However, it can have huge impact on local governments in a time of crisis. For example, during the SARS epidemic in 2003, the state council issued several influential urgent notices urging local

central government attached to takings issues, the above laws and regulations have not been fully enforced to protect private property.

*C. Problems with the Chinese Takings Laws*

1. Public Purpose Over Broadly Construed<sup>58</sup>

This research reveals that there is no single case in which a homeowner has even attempted to challenge the public purpose of a particular government project. No such case exists because “public interest” is an extremely elusive term in Chinese law, which in practice grants the government the absolute power to make decisions based on local leaders’ preferences. “Public interest” has been interpreted far beyond the scope of traditional for-public-use projects, such as highways, parks, or schools. It is not unusual for local governments to take private homes and hand them over to commercial developers under the guise of “public interest.” In reality, the government deems every action as being for a public purpose in China. Individual owners, therefore, simply do not have any cause of action to challenge the purpose of the project. The court, which is an integral part of the government, would not take such cases. Besides, very few lawyers are willing to accept cases challenging government decisions. In sum, there is no legal remedy when the government abuses the “public purpose” requirement in the takings law.

Additionally, local leaders are under enormous pressure from the central government to keep local Gross Domestic Product (“GDP”) high, so that the overall economic growth stays on the fast track. Since local leaders are appointed by the government at a higher level, rather than elected by the local people, the local leaders clearly know that their political fates hinge on how well they can fulfill the wishes of higher officials. In recent years, the sole standard for evaluating a leader’s ability is local GDP. For example, as an implied rule in Shandong Province, less than a 17% GDP increase would not bode

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governments to take measures on prevention, control, and treatment of the disease. *See generally* CHENGLIN LIU, CHINESE LAW ON SARS (2004).

58. This section is based on and updates Chenglin Liu, *Informal Rules, Transaction Costs, and the Failure of the Chinese “Takings” Law*, 29 HASTINGS INT’L & COMP. L. REV. 1, 6–15 (2005).

well for a local leader's political future.<sup>59</sup> The frantic pursuit of high GDP has resulted in many so-called "image" or "legacy" projects, by which leaders score high political credits needed for reappointment or promotion. Therefore, gigantic shopping malls, industrial parks, and skyscrapers, among others, are on the top agenda of new leaders.

During their five-year tenure, local leaders make every effort to achieve high economic growth. The most efficient way to develop the economy is to sell the land-use rights of the best location in town to foreign or domestic commercial developers. Due to historical reasons, the best locations with utility lines and easy access to transportation are usually condensed residential neighborhoods. In order to clear the way for commercial developers, local leaders first emphasize that the commercial development is for the local economy, and thus for public use. For the "bright future of the city," the leaders ask all residents affected by the project to make sacrifices by moving out in a timely fashion, accepting low compensation standards, and being willing to relocate to remote suburban areas. In cases of resistance, the leaders do not hesitate to authorize a forced eviction order to make room for economic development. Under the guise of "public purpose," local leaders utilize all powers at their disposal to facilitate commercial development.

Effective zoning laws could restrict local leaders from engaging in wasteful "image" or "legacy" projects. In practice, however, China's Urban Zoning Law is powerless because the People's Congress is not an independent co-equal branch that can enforce meaningful supervision over government decisions. Despite its increasing status in recent years, the People's Congress is still very weak in relation to the government. It is still beholden to the government for budget, essential supplies, and more importantly, appointments for key posts in the Congress. It is not uncommon for a government official, whose continuous appointment as a governor is barred by law,<sup>60</sup> to assume the key position in the Congress. As a result, there is no single case in

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59. Li Ming, *Shandong geshi zhuiqiu GDP gaosu zengzhang cheng diyu 17% nabuchu shou* [Cities in Shandong Province in a Hot Pursuit of High Economic Growth: Less than a 17% Increase in GDP is Not Enough], *Diyi Caijing Ribao* [FIRST FINANCE DAILY] (July 31, 2006).

60. The tenure of government officials is five years.

which a local People's Congress rejected the government's zoning plan or made substantial changes to it.

The second reason for failure to observe the Zoning Law is that the tremendous income from land sales accounts for a substantial part of local revenue. The national land sale income in 2006 reached 700 billion Yuan (U.S. \$10 billion).<sup>61</sup> Unlike tax revenue, the land sale income is not subject to budgetary supervision.<sup>62</sup> Land sales, therefore, have become the hottest way for local governments to make a profit.<sup>63</sup> Mr. Cangchun Gan, the head of legal department of the State Land Ministry, once referred to land sale income as "Mayor's pocket money," because it can be used at local leaders' will without effective restraints.<sup>64</sup> No city is willing to lose a competitive edge by imposing any zoning restriction on its ability to profit from land use right sales. Zoning Law is completely irrelevant when leaders make their decisions as to which tract to sell and for what purpose the land will eventually be put to use, where the sale will increase the local government's profit.<sup>65</sup>

## 2. Compensation Issues<sup>66</sup>

As discussed above, there is no room to challenge the public purpose of a particular project; therefore, the private owners whose homes have been condemned for economic development are left with no choice but to hope for fair compensation. These innocent hopes, however, are often dashed. Inadequate compensation has become the major source of confrontation between private owners and developers backed by local governments. Despite strict regulations on official media, national news outlets have reported some tragic protests against low compensation standards from time to time. In August

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61. Zhi Ling, *Tudi Churang Jing Cheng Difang Zhengfu "Zuire" Chuangshou Xiangmu* [Land Use Right Sale has Become the "Hottest" Item for Local Governments to Make Profit], ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY], Aug. 3, 2007.

62. *Id.*

63. *Id.*

64. Luo Tao, *Guotu Bu: Tudi Shouyi Buneng Chengwei Shizhang "Linghuaqian"* [The Ministry of State Land: Land Sale Income Should Not Become Mayor's Pocket Money], JINGJI CANKAO BAO [ECONOMIC INFORMATION DAILY], Sept. 12, 2006.

65. *Id.*

66. *See supra* note 58.

2003, Biao Weng poured gasoline on himself and set himself on fire at the local demolition and relocation office that had forcefully evicted his family and demolished his home without proper compensation; Mr. Weng burned to death.<sup>67</sup> On September 15, 2003, Zhengliang Zhu set himself on fire in the Tiananmen Square in Beijing protesting the government taking of his house without adequate compensation; Mr. Zhu was severely burned.<sup>68</sup> On September 14, 2006, Shulan Xie drank a bottle of pesticide in protest of the low compensation for her house taken for the Hunan Agricultural University campus expansion project.<sup>69</sup>

Having realized the serious social consequences resulting from inadequate compensation, the central government has repeatedly issued notices or regulations demanding that local governments increase compensation standards. In 2003, the Ministry of Construction issued the Guiding Opinions on the Appraisal of Urban Housing Demolitions (“Guiding Opinions”).<sup>70</sup> According to the Guiding Opinions, compensation for urban housing taken for economic development purposes must be based on market value. It is difficult, however, for the affected residents to find accurate market information given the immaturity of the Chinese real estate market. Acting upon developers’ request, local governments often take advantage of information deficiency and deliberately set a low compensation standard in order to cut development costs. Backed by the government, the developers often find various excuses to deny private owners’ legitimate demand for compensation, as soon as the demolition and relocation order is issued. Despite the law’s requirement that developers set aside funds for compensation and

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67. Wang Cijiang & Chengshi Chaiqian, *Sifa Heyi Quewai* [Urban Demolition: Lack of Law and Order], CHINA NET, Sept. 22, 2003, available at [www.china.org.cn/chinese/law/408670.htm](http://www.china.org.cn/chinese/law/408670.htm).

68. Yan Xiaomei, *Anhui Qingyang Xian Nongmin Zhu Zhengliang Zai Tiananmen Zifen Diaocha* [Report on Mr. Zhu’s Immolation in the Tiananmen Square], DONGFANG ZAO BAO [EAST MORNING NEWS], Sept. 18, 2003.

69. Cao Cang, *Hunan nongda chaiqian jiu fen diaocha: zhigong fudu qianren juji* [An Investigation of the Hunan Agricultural Demolition Incident: A Worker Swallowed Pesticide in Protest and Thousands Took the Street], ZHONGGUO JINJI ZHOUKAN [China Econ. Weekly], Nov. 13, 2006, available at <http://edu.people.com.cn/GB/5029855.html>.

70. Chengshi Fangwu Chaiqian Gujia Zhidao Yijian, 2003 [THE GUIDING OPINIONS ON THE APPRAISAL OF URBAN HOUSING DEMOLITIONS OF 2003], available at [http://news.xinhuanet.com/zhengfu/2003-12/03/content\\_1211069.htm](http://news.xinhuanet.com/zhengfu/2003-12/03/content_1211069.htm)

resettlement, very few developers are willing to do so due to lack of an enforcement mechanism.

Another problem with compensation is that property owners are often taken advantage of in the complicated relocation arrangements. According to the Regulations, private owners have a choice of being compensated with lump sum money or with a new property of the same size at a similar location.<sup>71</sup> Since the compensation standards are usually low and not enough for property owners to buy comparable housing, many owners choose to be compensated with a new property. The Regulations also provide that if the new property is larger than the condemned housing (which usually is the case), the owners need to pay the difference.<sup>72</sup> The rules seem to be fair to both sides, but developers have their own way to manipulate the rules.

In order to persuade property owners to accept relocation packages and vacate the proposed site quickly, some developers promise much larger property as compensation and offer a very preferable price for the difference that owners need to pay. As a result, property owners gladly accept the offer and sign the relocation and compensation agreements with developers. While waiting for completion of the project, property owners either find temporary housing by themselves with allowances paid by the developers or live in transit housing provided by the developers. The time to complete a project, however, can take several years or even a decade. By the time that relocation housing is ready, project management has changed hands several times. By law, the new developer is required to honor all the agreements between the initial developer and residents.<sup>73</sup> In practice, however, there are cases where the subsequent developers set various hurdles that prevent property owners from moving into their long awaited houses without paying large additional amounts of money. In some cases, the developer puts the relocation housing on sale at current market price.<sup>74</sup>

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71. The Regulations, art. 23-25.

72. *Id.* art. 25.

73. Jing Xiaofeng, *Chaiqian hu 11 nian deng budao hetong yueding huiqianfang gongzheng hetong cheng kongwen* [Property Owner Could Not Move to Relocation Housing After 11 Years, Notarized Contract is Not Honored], NANGUO ZHAOBao [SOUTH CHINA MORNING NEWS], Apr. 30, 2007.

74. See *infra* Part II.C.3.

### 3. Forced Eviction and Due Process of Law<sup>75</sup>

According to the Regulations, the Demolition Bureau is the only entity that arbitrates disputes between residents and developers with regard to compensation and resettlement. No resident trusts Demolition Bureau as an impartial arbitrator, because it has already approved the compensation standard and resettlement plan when granting the demolition license to the developer. It is unlikely that the Demolition Bureau would rule against its own decision in the arbitration. In addition, as a regular government division, it is impossible for the Demolition Bureau to be immune from external influence, especially from officials who have close ties to developers. According to a 2001 survey of five cities, conducted by Professor Wang, the chance for a resident to win arbitration from Demolition Bureau was only 0.03%.<sup>76</sup>

For residents, the consequence of losing in Demolition Bureau arbitration is disastrous. It means that they have to face an immediate forced eviction either by the developer authorized by the Demolition Bureau, or by judicial force. According to Article 16(2) of the Regulations, residents may appeal an unsatisfactory decision to the People's court; however, the Demolition Bureau's decision remains enforceable while the case is pending before the court.<sup>77</sup> This means that even if residents win their case in court, their only remedy is monetary damages. Injunctive relief has never been an option.

Forced eviction is often referred to as "savage eviction" or "violent eviction" by Chinese scholars.<sup>78</sup> Cutting off water and electricity, verbally threatening residents, physically assaulting residents, and sending thugs to break into homes are among the various means frequently utilized by condemners to drive residents

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75. See *supra* note 58.

76. WANG CAILIANG, FANGWU CHAIQIAN JIUFEN JIAODIAN SHIYI [GUIDE TO SOLVING DISPUTES OVER URBAN HOUSING DEMOLITION] 99 (2004) Only one in thirty-seven won the arbitral decision from the Demolition Bureau.

77. The Regulations, art. 16(1).

78. For example, Wang Cailiang criticized violent eviction in his book. See generally *supra* note 76.

away from their homes. Mr. Howard W. French, a New York Times reporter, made this observation<sup>79</sup>:

Stories are legion in Chinese cities of the arrest or even beating of people who protest too vigorously against their eviction and relocation. In one often-heard twist, holdouts are summoned to the local police station and return home only to find their house already demolished.

Mr. French's description only catches a few glimpses of what has happened during a demolition process in China. There are even worse cases than what he depicted above. Shanghai is the window of China's modernity, but few are aware of how much ordinary private owners have paid for the development. On January 9, 2005, Yang Sunqin, the Deputy CEO of Shanghai Chengkai Co., directed two staff, Wang and Lu, to set fire to Mr. Zhu's home in order to evict the family. The fire quickly consumed the building, in which Zhu's elder parents were burned to death. Zhu and other family members fled from an attic window and survived. Embarrassed by the incident, the government of Shanghai pledged to conduct a full investigation.<sup>80</sup> Three suspects were soon arrested. In August 2005, the deputy CEO and one staff were sentenced to death with a two-year suspension. The other staff member was sentenced to life imprisonment.<sup>81</sup> Mr. Liu Yungeng, Deputy Secretary of Shanghai Municipality admitted during a news conference that the conflicts between developers and homeowners were the major source of social discontent. Mr. Liu listed the horrendous means the developers used to force out homeowners, including taking away stairways at night, smashing doors and windows, and cutting off water and other utility lines.<sup>82</sup>

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79. Howard W French, *A Chinese Homeowner Stands Her Ground*, INT'L HERALD TRIB., Mar. 27, 2007, at 2.

80. Fu Jianfeng, *Shanghai "juqianhu" bei dichan shan zonghuo shaoshi shijian de beihou* [An In-Depth Investigation of the Incident in which Two were Burned to Death by Real Estate Developers], NANFANG DUSHI BAO [SOUTHERN METRO NEWS], Mar. 3, 2005.

81. Dai Wei & Tian Qilin, *Shanghai zonghuo biqian an tuxian chaiqian heimu* [Forced Eviction with Fire Reveals the Dark Side of Demolition and Relocation Activities], CAI JING [CAIJING MAGAZINE], Sept. 19, 2005.

82. Li Rong, *Shanghai jianjue daji dong chaiqian zhong sunhai qunzhong liyi de weifa xingwei* [Shanghai Determinedly Cracks Down on Illegal Demolition that Encroaches upon Residents' Property Right], XINHUA NET, Feb. 3, 2005.



The practice of forcing residents out by all means is likely to continue because the profits from the demolition projects outweigh all conceivable legal consequences.

### III. COMPARATIVE PERSPECTIVE

Economic development and large-scale takings sometimes go hand in hand. China is not alone in facing the tension between protection of private property and the need to make room for further economic growth. Whether it be a developing or developed economy, government takings are inevitable at various stages of economic development, as long as private ownership is recognized as a legitimate right. The ways of carrying out takings, however, vary greatly in different jurisdictions. The following section provides a comparative analysis of how takings laws in the United States and Singapore offer some potentially useful perspectives for legal scholars as well as the Chinese lawmakers.

#### *A. United States*

##### 1. Public Purpose: From a Narrow View to a Broad View

Eminent domain is used to take land for a “public use,” but what constitutes a public use? In the United States, it is very difficult to define “public use” in a precise and fixed form.<sup>83</sup> The concept of “public use” has been interpreted differently over time in the United States.

In colonial times, the taking of private property for public use through the power of eminent domain was not controversial. The concept of “public use” was, however, the subject of heated debates as the government played an increasing role in facilitating commercial development.<sup>84</sup> For a century (1830-1930), the debates involved two opposing points of view on how to construe “public use”: the narrow view and the broad view.<sup>85</sup> The narrow view held

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83. Nichols, *supra* note 35, § 7.02[1].

84. *Id.* § 7.01[3].

85. RICHARD R. POWELL, POWELL ON REAL PROPERTY 79F.03[3][a] [hereinafter POWELL].

that private property taken through eminent domain must provide its intended use to the public.<sup>86</sup> “The public must be entitled, as of right, to use or enjoy the property.”<sup>87</sup> The broad view maintained that “public use” included not only uses that were directly beneficial to the public, such as roads, but also uses to promote the general welfare and prosperity of the whole community.<sup>88</sup> Early judicial decisions embraced both approaches, which rendered the eminent domain doctrine inconsistent and unpredictable.<sup>89</sup>

In the 1910s, the U.S. Supreme Court began to reject the narrow view in favor of the broad view, when it found the former to be an “unacceptable tool” in analyzing takings cases.<sup>90</sup> Further, the Court became increasingly deferential to Congress’s decision to utilize the power of eminent domain for “public use.”<sup>91</sup> This trend was reflected in a 1954 Supreme Court case, *Berman v. Parker*.<sup>92</sup> In *Berman*, a redevelopment project called for the appropriation of certain private properties in accordance with a Congressional act. A private owner, whose department store was in the condemnation area, challenged the constitutionality of the act and sought to enjoin the condemnation. The owner argued that the condemnation was not for public use and violated his property rights because the government intended to transfer the condemned property to another private owner. The Court, after expressing its deference to the legislature,<sup>93</sup> upheld the constitutionality of the act and confirmed the government’s right to condemn the property, provided that the owner received just compensation.<sup>94</sup>

In 1984, the Supreme Court once again demonstrated the “broad view” approach and its deference to the legislature in another leading

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 79F-28. *See also* Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 209 (1978).

90. POWELL, *supra* note 85, 79F.03[3][b] at 79F-29.

91. *Id.*

92. *Berman v. Parker*, 348 U.S. 26 (1954).

93. *See id.* at 32. “Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases, the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”

94. *Id.*

case, *Hawaii Housing Authority v. Midkiff*.<sup>95</sup> At issue in this case was the constitutionality of the Hawaii Land Reform Act of 1967 (the “Act”). Under the Act, lessees living on single-family residential lots owned by private landowners were entitled to ask the Hawaii Housing Authority (“HHA”) to condemn the property on which they lived. The Act was enacted to reduce the over-concentrated land ownership in Hawaii. Pursuant to the Act, the HHA conducted a public hearing and found that condemnation would affect the public purpose.<sup>96</sup> The landowners filed a lawsuit alleging the Act violated the public use clause of the Fifth Amendment because the condemned lands were taken from one private owner and handed over to another. Citing *Berman v. Parker*, the Supreme Court restated its deference to the local legislature stating, “The ‘public use’ requirement is thus conterminous with the scope of a sovereign’s police power.”<sup>97</sup> The Court then pushed the scope of “public use” even further by stating that the mere taking of property from one private owner and giving it to another does not “condemn that taking as only a private purpose.”<sup>98</sup> “[I]t is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”<sup>99</sup> The Court found that the Act was constitutional, because it was enacted to “reduce perceived social and economic evils” caused by the over-concentrated ownership in the Hawaii real estate market.<sup>100</sup>

The broad view has also found support in State courts.<sup>101</sup> State governments are not immune from the influence of commercial developers and interest groups.<sup>102</sup> To revitalize local economies, add jobs, and collect taxes,<sup>103</sup> some states have stretched the broad view

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95. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

96. *Id.*

97. *Id.* at 240.

98. *Id.* at 244.

99. *Id.*

100. *Id.* at 241–42.

101. POWELL, *supra* note 85, 79F.03[3][c], at 79F-32.

102. Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L. REV. 197, 199 (2003).

103. For example, section 2 of the [Michigan] Planning, Housing, And Zoning Economic Development Corporations Act provides:

There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local industrial and commercial enterprises . . . it is also necessary

to the extreme. In *Poletown Neighborhood Council v. City of Detroit*,<sup>104</sup> the Detroit Economic Development Corporation condemned a low-income Polish neighborhood consisting of private homes, churches, and businesses and transferred the tract of land to General Motors (“GM”) for use in an assembly plant. The neighborhood association and several residents in the affected area brought a lawsuit challenging the constitutionality of using the power of eminent domain to condemn private property to boost the economy. The residents argued that this taking was for private use instead of public use, despite the incidental benefit GM may bring to the public. The Michigan Supreme Court paid similar deference to the legislature as the U.S. Supreme Court did in *Berman v. Parker*. The Michigan court found that the legislature was better suited to decide whether the use of eminent domain met a public need.<sup>105</sup> Over two vigorous dissents, the court upheld the validity of the condemnation. Even though legal scholars heavily criticized the *Poletown* decision,<sup>106</sup> the precedent stood for over two decades, during which eleven cases followed *Poletown*. The controversial case was finally overruled by the same court in a 2004 case, *County of Wayne v. Hathcock*,<sup>107</sup> where private owners successfully blocked the

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to encourage the location and expansion of industrial and commercial enterprises, including employee-owned corporations, to more conveniently provide needed services and facilities of the industrial and commercial enterprises to municipalities and the residents of the municipalities. . . . Therefore, the powers granted in this act constitute the performance of essential public purposes and functions for this state and its municipalities.

MCLS § 125.1602 (2004) (emphasis added). To further the objectives of this act, the legislature has authorized municipalities to acquire property by condemnation in order to provide industrial and commercial sites and the means of transfer from the municipality to private users. Sec. 22 of the above act provides:

A municipality may take private property . . . for the purpose of transfer to the corporation, and may transfer the property to the corporation for use in an approved project, on terms and conditions it deems appropriate, and the taking, transfer, and use shall be considered necessary for public purposes and for the benefit of the public.

MCLS § 125.1622 (2004) (emphasis added).

104. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

105. *Id.* at 458.

106. See Timothy Sandefur, *A Gleeeful Obituary for Poletown Neighborhood Council v. Detroit*, 28 HARV. J.L. & PUB. POL’Y 651 (2005).

107. *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

city's decision to condemn private lands for developing a technological park.

## 2. The *Kelo* Decision

After *Midkiff*, the Supreme Court did not revisit its view on the scope of "public use" for two decades until *Kelo v. City of New London*<sup>108</sup> was brought before the Court in 2005. The central issue in *Kelo* was whether economic development fell within the scope of "public use." Unlike the *Midkiff* court, which unanimously held for the government, the *Kelo* court was sharply divided. In a five to four decision, the Court upheld the "broad view" approach established in *Berman* and *Midkiff*.

The City of New London is located at the junction of the Thames River and Long Island.<sup>109</sup> Despite its superb location, the City's economy was in decline for several decades. In 1998, the City's unemployment rate was nearly double that of the state and its population reached a record low. To revitalize the City's economy, the State authorized the New London Development Corporation (NLDC), a private nonprofit entity, to draw up redevelopment plans. The State issued multi-million dollar bonds in support of the NLDC's planning activities to create Fort Trumbull State Park. At the same time, Pfizer Inc. announced its plan to build a \$300 million research facility in the vicinity of the State Park.<sup>110</sup> Both the City and the State saw Pfizer's project as a catalyst to the area's rejuvenation. In order to facilitate Pfizer's investment and other commercial opportunities in anticipation of Pfizer's arrival, the NLDC finalized an integrated development plan. The plan required ninety acres of the Fort Trumbull area to be condemned for the project. Petitioners owned properties within the Fort Trumbull area.<sup>111</sup>

The petitioners raised several arguments. First, they argued that the Court should adopt a new bright-line rule that disqualified economic development as "public use."<sup>112</sup> The Court rejected the

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108. *Kelo v. City of New London*, 545 U.S. 469 (2005).

109. *Id.* at 473.

110. *Id.*

111. *Id.*

112. *Id.* at 484.

petitioners' claim by reaffirming the pivotal role of the government in revitalizing the local economy. The Court held that promoting economic development is a traditional government function.<sup>113</sup> After drawing comparisons to *Berman*, *Midkiff* and other cases, the Court concluded that *Kelo* was indistinguishable from previous cases. It held that "there [was] no basis for exempting economic development from our traditionally broad understanding of public purpose."<sup>114</sup> In the decision, Justice Stevens emphasized that the development plan was "carefully considered," and there was no evidence of an illegitimate purpose.<sup>115</sup>

Then the Petitioners argued that using eminent domain for economic development blurred the boundary between public and private takings.<sup>116</sup> Citing *Midkiff* and *Berman*, the Court reasoned that government redevelopment projects would often benefit individual private parties whether the projects were carried out by the government itself or by private entities.<sup>117</sup> The Court held that "[t]he public end may be as well or better served through an agency of private enterprise than through a department of government."<sup>118</sup> Finally, the petitioners argued that the court should require a "reasonable certainty" that the expected public use would actually succeed.<sup>119</sup> The Court reiterated its long held deferential approach and declined to second-guess the efficacy of the NLDC's well-thought redevelopment plan.<sup>120</sup> It also declined to consider how the NLDC would eventually use the condemned property.<sup>121</sup>

The *Kelo* decision has drawn enormous criticism. Justice O'Connor, joined by the Chief Justice, and Justices Scalia and Thomas, raised vigorous objection to the majority of the Court. In her dissenting opinion, O'Connor accused the Court of abandoning its "long held, basic limitation on government power."<sup>122</sup> She warned of

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113. *Id.*

114. *Kelo*, 545 U.S. at 485.

115. *Id.* at 484–85.

116. *Id.* at 485.

117. *Id.*

118. *Id.* at 486.

119. *Id.* at 487.

120. *Kelo*, 545 U.S. at 488.

121. *Id.* at 489.

122. *Id.* at 494.

the serious consequences if the Court failed to exercise its necessary judicial check when one takes property from A and gives it to B:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in process.<sup>123</sup>

O'Connor further pointed out that the *Kelo* decision made private and public use indistinguishable, because it qualified economic development takings as “public use,” as long as there were any incidental public benefits from subsequent ordinary use of private property.<sup>124</sup> In O'Connor's view, the decision rendered the words “for public use” meaningless under the Takings Clause of the Fifth Amendment.<sup>125</sup>

Given the heated debate that the *Kelo* decision brought to legal scholars, by no means does it stand as the last word on U.S. jurisprudence regarding eminent domain. As Professor Burke observed, while the Supreme Court refused to interfere with the City's judgment, it “explicitly reminded the states of their potentially more expansive role in the protection of private property rights. In essence, the Court said to the states that this decision was a matter of policy and that in addressing this policy question, *legislatures should consider their constituents' outrage as a part of the democratic process*. Such consideration is not within the purview of the courts.”<sup>126</sup>

The *Kelo* decision immediately triggered a nationwide backlash from state legislatures. Alabama became the first state to enact new law against local-government seizure of property.<sup>127</sup> In an elaborate signing ceremony, Governor Riley touted the new bill, stating, “A property rights revolt is sweeping the nation, and Alabama is leading

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123. *Id.*

124. *Id.*

125. *Id.*

126. Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663, 683 (2006.)

127. Donald Lambro, Alabama Limits Eminent Domain, WASH. TIMES, Aug. 4, 2005, at A1.

it.”<sup>128</sup> With the new state bill, “Alabamians can rest assured that their homes, farms, business and other private property are safe from being seized by government for a shopping center, or a factory, an office building or new residential development.”<sup>129</sup> Following the suit, thirty-four states enacted legislation or passed ballot measures during 2005 and 2006 in response to the *Kelo* decision. The remaining sixteen states, along with others that had previously passed laws, considered bills in 2007.<sup>130</sup> While it remains unclear whether any of these provisions will significantly narrow the power of eminent domain in the U.S. post-*Kelo*, the fact that state governments can restrain the broad federal approach provides a key difference in its purported support of the takings law in China.

### 3. The *Kelo* Debate in China

American scholars may be surprised that the *Kelo* decision received enormous fanfare from the Chinese media. Some scholars claimed that the protection of property under the U.S. Constitution was all but an empty promise.<sup>131</sup> A few weeks after the decision, the China Real Estate News, the official newspaper of the Chinese Construction Ministry, published a long article about the *Kelo* case.<sup>132</sup> Land Bureaus in major cities, which have been plagued with a takings problem, posted a Chinese translation of the *Kelo* decision on their websites with the subtitle, “*Kelo v. New London*: How the U.S. Supreme Court deals with economic takings.”<sup>133</sup> The purpose of making the *Kelo* decision available from the Chinese governmental agency’s news outlet was obvious: (1) it implied that the United States was no better than China in protecting private property; and (2)

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128. *Id.*

129. *Id.*

130. <http://www.ncsl.org/programs/natres/EMINDOMAIN.htm>

131. REN DONGLEI, MEIGUO DE CHAIQIAN ZHENGDI GUANSI [THE EMINENT DOMAIN CASE IN THE UNITED STATES] <http://www.tecn.cn/data/detail.php?id=7455>.

132. Zhong Yuan, *Guojia zhengyong de falu yubo* [The Shockwave of Government Takings], CHINA REAL ESTATE NEWS, July 18, 2005.

133. Cong Fei Tian, “*Kailuo su xin lundun shi an*” *Jiedu meiguo zhengfu ruhe jie jue zhengdi zhengyi* [Interpreting U.S. Takings Law from the *Kelo* Case], ZHONGGUO FANGDICHAN BAO [CHINA REAL ESTATE NEWS], Dec. 12, 2005.



takings for economic development was not only justified in China, but also in the U.S.

The debate about the *Kelo* case among Chinese scholars has been valuable and healthy. These scholars, however, seem to miss one crucial point—why the U.S. Supreme Court took its deferential approach, that is, let the New London Legislature decide the purpose of the takings. In the *Kelo* decision, Justice Stevens emphasized that the development plan was “carefully considered,” and there was no evidence of an illegitimate purpose. To a large extent, the Court relied on the judgment of the local government, which was duly elected and its decision was approved by the local legislature.

In China, however, the local government is not elected by the people, but appointed by officials at a higher level of government. Consequently, local leaders are accountable to governments at a higher level, and not to the local people. When the central government sets a goal for rapid economic growth, local leaders accomplish the goal by all means, with little consideration for subsequent costs of such development plans. Local development plans are often made in haste and in secret, without consultation with the local people. In theory, the local People’s Congress should have the power to make the final decision on development plans. In practice, however, the Congress is not independent from the central government. There is not a single case where the Congress has disapproved a government proposal.

At an ideological level, private property is treated differently in the U.S. than in China. In the United States, the origins of property can be traced back to several schools of thought: natural rights, personal protections, and economic utility.<sup>134</sup> The natural right theory stems from John Locke’s writings, which were very influential in early America. His works are still widely studied and cited by many scholars. According to Locke, property is a natural endowment that every member of a society deserves to have. The right to property is a pre-social or pre-legal right coming from God. Like the rights to life and liberty, the right to property should not be subject to restriction

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134. See generally 2-5 NICHOLS ON EMINENT DOMAIN § 5.01 (1997).

by the state. The goal of a civil society is the protection of property rights.<sup>135</sup>

The second school of thought asserts that it is vital to protect property rights because they are closely connected with personal rights. Without property rights, other rights are not possible. In a widely cited passage, Justice Stewart depicts the correlations of property rights and other fundamental rights:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.<sup>136</sup>

This school of thought advocates strong property rights protection. If property rights can be arbitrarily changed, other rights will be in jeopardy.

The third school of thought emphasizes the economic utility aspect of property rights. As Posner points out, “legal protection of property rights creates incentives to exploit resources efficiently.”<sup>137</sup> The protection of property rights is a practical means to achieve economic prosperity, rather than the ultimate goal of a society. When the government believes that property owners stand in the way of economic development, it will change the existing rules to assign valuable resources to the presumed efficient users. A typical example is exercising the power of eminent domain to facilitate economic development. This school of thought does not invariably support strong property rights.

Each school of thought has merit. No single school is a dominant theory that is universally accepted by American scholars. Instead, the

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135. 2-5 NICHOLS ON EMINENT DOMAIN § 5.01 [3][a]i (1997).

136. *Lynch v. Household Finance*, 405 U.S. 538, 552 (1972).

137. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 32 (6th ed. 2003).

combination of these intellectual traditions has played an important role in shaping the current American jurisprudence of property law.

In China, the economic utility theory underlies current property reforms. This theory persists because the reforms are largely driven by the economic need to foster private property rights, rather than the desire to protect individual freedoms. After several decades of communist rule, it is difficult for China to eradicate a deep-rooted ideology, which holds that the state is the only source of individual rights. Neither the ears of the public nor of the intellectuals are sensitive to natural rights theory. Further, the theory linking personal protections and property rights does not appeal to top decision makers, because they focus more on social stability than individual freedom. Naturally, the economic utility theory finds a large audience among Chinese decision-makers as well as scholars, who strive to find a well-crafted theory to justify the means for economic growth. Locke's theory is rarely mentioned, let alone having an influence in the lawmaking process.

### *B. Singapore*

By turning a sleepy fishing village into an attractive international metropolitan area in a span of three decades, Singapore has impressed the world with its superb economic performance. Singapore has become a model for many Asian countries striving for modernity and prosperity. As a result, a great deal of literature has been devoted to finding the causes of this economic miracle. Very few scholars, however, have examined the mixed impact of the Singaporean takings law on the economic development and social justice of the country. The problems that Singapore faced in the 1960s bear striking resemblance to what the Chinese government is facing today. With over 75% of the population being ethnic Chinese, Singapore shares a similar culture and tradition with China. Despite the differences in state structure and legal systems, the two nations have taken similar paternalistic measures to maintain social order, including public housing and compulsory land acquisition. (In the 1970s, Singapore even imposed strict family planning in order to relieve the pressure on the housing supply resulting from rapid

population growth.) A study of Singaporean takings law, therefore, offers unique lessons for China.

### 1. Public Purpose

The Japanese occupation in the 1940s left Singapore's economy in a devastated condition. When the People's Action Party ("PAP") assumed power in 1959, it faced the enormous challenge of rebuilding Singapore from ruins. In order to maintain political power, the PAP focused on practical ways to improve its citizens' standard of living. The PAP made public housing a top priority, because it viewed housing as "a crucial ingredient to immediate and lasting success."<sup>138</sup> To fulfill this campaign promise, the PAP laid out a master plan to redevelop Singapore, which required large-scale land acquisition.<sup>139</sup>

The major legal hurdle for land acquisition was the constitutional guarantee that prevented the government from taking private land without paying just compensation. Before 1965, the Malaysian Constitution applied to Singapore. Article 13 of the Malaysian Constitution provided:

- (1) No person shall be deprived of property save in accordance with the law;
- (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.<sup>140</sup>

In most democratic countries, just compensation is designed to prevent the government from abusing the power of eminent domain. Singapore had two options to pursue its redevelopment plan. One was to abide by the Constitution, which meant that the government would pay just compensation to owners whose properties were taken for public use. The other was to eliminate the constitutional guarantee, so

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138. Aya Gruber, *Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System*, 38 HARV. INT'L L.J. 236, 239 (1997).

139. *Id.* at 247–49.

140. Kevin Tan, Signapore Country Report at 23, in *Coordinador de Derecho comparado Asia-México, Culturas y Sistemas Jurídicos Comparados* (IIJ-UNAM 2007), available at <http://www.bibliojuridica.org/libros/5/2398/10.pdf>.

that the government would have no limits when taking private property. The PAP chose the latter. In the PAP's view, compensation was an unjustified burden for its redevelopment plan.<sup>141</sup>

In 1965, when Singapore separated from Malaysia, the PAP took advantage of the opportunity and proposed to exclude Article 13 in the new Singaporean Constitution. Prime Minister Lee Kuan Yew, the founding father of the modern Singapore state, expressed his deep concern that the constitutional guarantee would bog down the acquisition process, and thus hinder economic development.<sup>142</sup> During a parliamentary debate on whether Article 13 should be included in the new Constitution, Mr. Lee made his view unequivocal:

We have specifically set out to exclude [Article 13] . . . Once we spell out that no law shall provide for the compulsory acquisition or use of property without adequate compensation, we open the door for litigation and ultimately for adjudication by the Court on what is or is not adequate compensation.<sup>143</sup>

Mr. Lee based his assertion on the lesson that the government learned during the construction of the Jurong Industrial Site. In that project, the government invested a considerable amount of state funds for developing infrastructure. With the completion of the project, the value of adjacent land went up rapidly. When the Jurong Industrial Site needed to expand and build ancillary services, such as schools and hospitals, the government had to pay hefty compensation to landowners according to the previous law. In Mr. Lee's view, had the government not developed the industrial site, the value of adjacent land would not have appreciated. The government compensation at current market price was a windfall for the property owners, who had contributed nothing. The enhanced value was "created wholly by the expenditure of state funds."<sup>144</sup>

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141. Singapore Parliamentary Debates Official Report, 22 December 1965, at columns 435–36.

142. *Id.*

143. *Id.*

144. *Id.*

Since the PAP was the dominant party in Singaporean politics, the Parliament passed Mr. Lee's proposal to exclude Article 13. Despite the fact that the Constitution has gone through various changes in the last four decades, the current Singaporean Constitution has not yet embraced any guarantee that is comparable to the Fifth Amendment to the U.S. Constitution.

Without constitutional constraints, the Parliament passed the Land Acquisition Act ("LAA") in 1966, which granted expansive power to the government. Article 5(1) of the LAA provided that private property can be taken for the following purposes<sup>145</sup>:

Whenever any particular land is needed—

- (a) for any public purpose;
- (b) by any person, corporation or statutory board, for any work or an undertaking which, in the opinion of the Minister, is of public benefit or of public utility or in the public interest; or
- (c) for any residential, commercial or industrial purposes, the President may, by notification published in the Gazette, declare the land to be required for the purpose specified in the notification.

Article 5 (1) is so inclusive that any takings could fit in its scope. In practice, it makes challenging the purpose of government takings impossible. In *Galstaun v. Attorney-General*,<sup>146</sup> the owner's land was acquired for the extension of a public road. The owner found that the extension project was already finished when his land was acquired. As a result, the owner brought an action to court alleging that the government did not actually use the acquired land for the road extension project as announced in the official gazette. Among other claims, the owner sought a declaratory judgment that the purported acquisition was illegal on the ground that the government had abused its power. The court emphasized the government's broad power

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145. Tan, *supra* note 140, at 28.

146. *Galstaun v. Attorney-General* [1981] 1 MLJ 9, at p 10, per FA Chua J.

conferred by Section 3 of the Land Acquisition Act and rejected the owner's claim. The court reasoned:

The government is the proper authority for deciding what a public purpose is. When the government declares that a certain purpose is a public purpose, it must be presumed that the Government is in possession of facts which include the Government to declare that the purpose is a public purpose.<sup>147</sup>

In *Galstaun*, the court made it extremely difficult for subsequent litigation to succeed over whether a particular taking is for public use. This line of reasoning echoes the *Berman* case, in which the U.S. Supreme Court asserted, "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."<sup>148</sup> In Singapore, unfortunately, there are virtually no limitations on takings, because the constitutional guarantee was stripped away from the Constitution.

Another case, *Basco Enterprises PTE LTD v. Soh Siong Wai*<sup>149</sup> demonstrates the unchallengeable nature of public purpose doctrine in Singaporean Law. In this case, the appellant owned a colonial building, Stamford House, located at the center of Singapore. The Urban Redevelopment Authority ("URA"), a government agency, condemned the building in 1984 for redevelopment. The owner was compensated at the building's 1973 market value. After the title was transferred to the URA, the owner learned that the building was actually used for cultural preservation. The façade of the building was preserved; the interior was used for retail outlets. The URA put the house on sale by open public tender at then-current (1988) market value. The owner sued the URA, alleging that the URA acted in bad faith when it acquired the building because its ultimate use of the building was not for the alleged purpose. The owner also contended that the URA acted *ultra vires* by taking private property for cultural preservation, a jurisdiction that fell within the exclusive realm of another government agency.

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147. *Id.*

148. *Berman v. Parker*, 348 U.S. 26 (1954).

149. *Basco Enterprises PTE LTD v. Soh Siong Wai* [1989] 1 SLR 150.

The Court dismissed the owner's claims and ruled in favor of the URA. It is not clear whether Judge Keong read the *Berman* case, yet his reasoning strikingly resembled that in *Berman*. First, Judge Keong stated that the building at issue should not be considered in isolation because the redevelopment project affected other buildings in the area. After confirming the broad ambit of urban redevelopment, the Court held that the URA was the proper agency to decide how to use the condemned buildings. Second, Judge Keong was reluctant to second-guess the government's decision. He reasoned that "[i]t is not necessary for [the Court] to decide the narrower point [of whether] Stamford House had been acquired alone for urban redevelopment."<sup>150</sup>

## 2. Compensation

In Singapore, the compensation for condemned property is based on market value. The meaning of market value, however, differs greatly from that in the U.S. The general rule in the U.S. is that the value of the condemned property is fixed at the time the property is taken.<sup>151</sup> In Singapore, the price is determined by the market value at either of the two retrospective dates set in the law. If there is a difference between the values, the lower is applicable. This compensation scheme is laid out in Section 33 of the Land Compensation Act ("LCA"),<sup>152</sup> which provides:

Section 33. —(1) In determining the amount of compensation to be awarded for land acquired under this Act, the Board shall . . . take into consideration the following matters and no others:

(a) the market value —

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150. *Id.*

151. 4-12A NICHOLS ON EMINENT DOMAIN § 12A.01 (1997).

152. N. KHUBLALL, COMPULSORY LAND ACQUISITION—SINGAPORE AND MALAYSIA 118 (2d ed. 1994).



(i)

(A) as at 1st January 1986 in respect of land acquired on or after 30th November 1987 but before 18th January 1993;

(B) as at 1st January 1992 in respect of land acquired on or after 18th January 1993 but before 27th September 1995; and

(C) as at 1st January 1995 in respect of land acquired on or after 27th September 1995;

. . . whichever is the lower.

The objective of this provision was to ensure that property owners would not be unjustly enriched by any government-funded project. Its unfairness, however, is evident in the decision of *Collector of Land Revenue v. Ang Thian Soo*.<sup>153</sup> At issue in this case was whether the compensation should be based on the market value as of the retrospective date set in Section 33(1)(a)(i), or as of the date of acquisition. Based on the former standard, Mr. Soo would only be paid \$236,450, despite the fact that he bought the house for \$335,000. If the latter standard applied, the compensation award would be as much as \$670,000.

What made this case unique was that the construction of Soo's house was not finished until four years *after* the retrospective date for compensation set in the law. Mr. Soo argued that the retrospective date was irrelevant in valuing his house because the house was not built, and thus it did not have any market value at that time. In supporting his argument, Soo cited two similar cases, in which owners were compensated according to the values at the date of condemnation, because their houses did not exist at the retrospective date. The trial court (the Board) accepted Soo's argument and ruled that the compensation should be based on the date of acquisition and awarded Soo with \$670,000 in compensation. The Collector appealed the decision to the Appellate Court, which not only overruled the trial court decision, but also the two cases that Soo cited. The Appellate Court's approach was straightforward. It literally applied the original text of Section 33(1)(a), and concluded that Mr. Soo's

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153. *Collector of Land Revenue v. Ang Thian Soo* [1990] 1 SLR 11.

argument was contrary to the express words of the law. It held that the acquisitioned property should only be valued at the dates set in the law, whichever is the lower amount, with no other factors considered. Consequently, the only evaluation standard applicable in this case was the lower of the prescribed market values. Therefore, the Appellate Court reduced the amount of the compensation from \$670,000 to \$260,000.<sup>154</sup>

This case elicited heavy criticism from Singaporean scholars, because it ran afoul of the basic principle of the takings law commonly recognized in the academia.<sup>155</sup> The ruling in the *Soo* case rendered the property owner in a much worse situation. Professor Khulall commented that the current scheme for compensation was unfair and should be changed, because property owners in Singapore “w[ere] unreasonably penalized when their property [was] condemned”<sup>156</sup>:

In this day and age, when land values are generally rising, it is wrong both in principle and in equity to award compensation on the basis of a retrospective date. It is abundantly clear that a dispossessed landowner cannot get the equivalent in compensation what he is compelled to give up.<sup>157</sup>

Another distinct aspect of the Singaporean law regarding compensation is the setoff provision.<sup>158</sup> It is laid out in Clause (b) of Section 33(1). This provision requires that the Board of Appeal consider any increase in the value of an interested owner’s other property that is “likely to accrue from the use to which the land acquired will be put.”<sup>159</sup> In other words, this provision means that if the new development after the takings is likely to increase the value of the owner’s remaining property, the increased value (or betterment) should be set off against the compensation for the owner’s condemned property.

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154. *Id.*

155. Khulall, *supra* note 152, at 119.

156. *Id.* at 120.

157. *Id.* at 119–20.

158. *Id.* at 199.

159. *Id.*

The setoff clause has its origin in Section 7 of the English Land Compensation Act of 1961, which provides:

Where the vendor retains any contiguous or adjacent land, the value of which is enhanced by development carried out or proposed to be carried out under the 'scheme', the betterment is to be set-off against the compensation otherwise payable.<sup>160</sup>

The Singaporean law is more stringent than the English provision, because it does not require the owner's remaining land to be contiguous or adjacent to the condemned property. Any enhancement that the new development would bring to the owner's remaining property, no matter where it is located, will be offset against the compensation for the part taken.<sup>161</sup>

In practice, however, it is difficult for the court to apply the setoff provision for two reasons.<sup>162</sup> First, it is almost impossible to accurately assess how much a new development project will enhance the owner's remaining property. For a new project to be profitable, it usually takes years, if not decades, to see the results. In reality, some projects may seem promising, but fail in the end. Neither the owners, nor the collector can guarantee the success of the project. Second, supposing that the project is successful, it is still difficult to ascertain how the project will enhance the owner's interests. The owner may be tangentially benefited from the new development as a member of the public. It would be unfair to count the general benefit against the compensation for the owner's condemned property.

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160. The setoff principle can be found in other English legislation regarding land acquisition. For example, Avon Weir Act of 1992, Section 33 provides:

(2) In assessing the compensation payable to any person on the acquisition by the Corporation from him of any relevant land, the tribunal shall— (a) have regard to the extent to which the land or the remaining contiguous lands belonging to the same person may be benefited by any of the works; and (b) *set off against the compensation payable any increase in value of the remaining contiguous lands belonging to the same person which will accrue to him by reason of the construction of any of the works.*

(emphasis added). The full text of Avon Weir Act of 1992 is available at the Office of Public Sector Information (OPSI)'s website: [http://www.opsi.gov.uk/ACTS/locact92/Ukla\\_19920005\\_en\\_4.htm#mdiv33](http://www.opsi.gov.uk/ACTS/locact92/Ukla_19920005_en_4.htm#mdiv33).

161. KHUBLALL, *supra* note 149, at 119.

162. *Id.*

### 3. Not a Model for China

Tourists are fond of the views of skyscrapers, which symbolize Singapore's modernity and prosperity. Scholars enjoy touting sharp growth charts and persuading developing countries to copy the same model—pursuing an economic miracle at minimum costs. Very few, however, have frankly focused on the tremendous social costs associated with the making of so called “miracles,” the negative impact of which may not be immediately seen.

Suppressing individual freedom and denying property owners just compensation have a devastating impact on the public. It is a miscalculation when social costs are not taken into consideration. As a commentator noted:

The omnipresence of a paternalistic government indicates that [Singapore] is in danger of losing its soul. In a world where personal freedoms often give fundamental definition to one's existence, the leadership of Singapore appears bent on subordinating such freedoms in favor of its national agenda aimed at economic success.<sup>163</sup>

Singapore's economic achievement is undeniably impressive and as such, the Singapore model sounds appealing to many leaders in China who are striving to achieve visible results during a short period of time, usually within a five-year tenure. The questionable means that the Singapore government utilized to reach the end would not however prove beneficial to China in the long run. Social riots and other serious problems demonstrate that China cannot afford to ignore social justice during its course of economic growth.

#### *C. Administrative Costs for Eminent Domain Compared*

The takings laws presuppose that government can take private property without the owner's consent. But that does not mean that the government has unlimited power to utilize the power of takings. In the United States, the taking clause provides two limitations on the

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163. Aya Gruber, *Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System*, 38 HARV. INT'L L.J. 236, 237 (1997).

government: private owners are entitled to just compensation and the project has to be for public use. The public use requirement limits the very scope of the eminent domain power. Government may compel an individual to forfeit her property for the public's use, but not for the benefit of another private person. This requirement promotes fairness as well as security.<sup>164</sup> The purpose of the just compensation requirement is to spread the cost of condemnations and thus "prevents the public from loading upon one individual more than his just share of the burdens of government."<sup>165</sup> The administrative costs serve as deterrence against abuse of eminent domain power.

Merrill's administrative costs of eminent domain (as described in the introduction) serve as a unique benchmark in comparing takings laws in China, the U.S., and Singapore, despite their drastically divergent political, legal and economic backdrops. According to Merrill,<sup>166</sup> the probable relations among the exercise of eminent domain power, transaction costs and administrative costs are as follows:

Eminent domain becomes economically attractive, when the transaction costs of open market exchange exceeds the administrative costs of exercising eminent domain. When the costs of market exchange fall below administrative costs, eminent domain becomes undesirable.

The administrative costs are relatively independent of the fluctuations of rent-seeking opportunities. It means that the government should not lower the costs just because a new development has a great potential to bring in more tax revenue than private owners. Additionally, administrative costs should be higher than transactions costs in a highly competitive market. This requirement is important because it ensures that the government can only use eminent domain as a last resort. In order to apply the theory in the comparison, Merrill's model is reproduced in the following

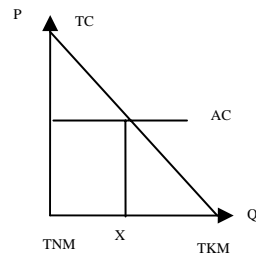
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164. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336 (2002) ("The concepts of 'fairness and justice' . . . underlie the Takings Clause . . .").

165. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893); *see also* *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

166. *See supra* note 1.

chart. Eminent domain is economically viable in the markets to the left of X (i.e. the so-called “thin markets”).



P: price of land; Q: quantity of land (number of land sellers)

TC: transaction costs if purchasing from the open market

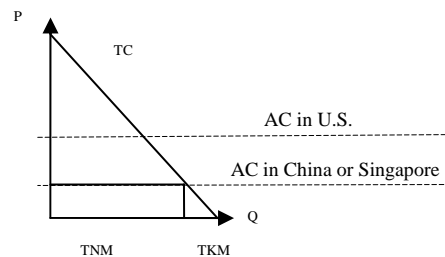
AC: Administrative costs for enforcing eminent domain, or called “due process costs.”

TNM: thin market; TKM: thick market

To take Merrill’s theory one step further, one corollary to be drawn is that the likelihood of the abuse of eminent domain power will increase when the administrative costs are artificially low. The comparisons in previous sections attest to this assertion. The administrative costs in China are extremely low because the government has the sole power to draw development plans without public consultation. It even has the power to redraw zoning maps to legitimize a particular development project. The government deliberately sets property value low in compensating property owners. Property owners are not entitled to genuine public hearings before takings, do not have an effective means of challenging government decisions, and are often forced to move without proper notice. The low administrative costs have made eminent domain extremely appealing to commercial developers. As a result, the abuse of eminent domain powers has been prevalent (as discussed in Parts I and II). The same is also true with Singapore, where the ruling party stripped off the constitutional guarantee from its new constitution merely for the convenience of taking private properties. By pegging compensation value retrospectively to outdated “market value,” the Singaporean law has substantially reduced the administrative costs of

government takings, which contributed to the widespread practice of takings in the 1960s.

The following diagram depicts the administrative costs in China and Singapore are substantially lower than that in the U.S. In theory, low administrative costs account for the abuse of eminent domain power in China and Singapore.



P: price of land; Q: quantity of land (number of land sellers)  
 TC: transaction costs if purchasing from the open market; AC: Administrative costs for enforcing eminent domain, or called "due process costs."  
 TNM: thin market; TKM: thick market

#### IV. CONCLUSION: IDEOLOGY, REALITY, AND ADMINISTRATIVE COSTS

It is difficult to know exactly how a particular government determines the justifiable level of administrative costs necessary for takings of private properties. One related factor, however, is certainly the ideological beliefs that underline almost all governmental actions.

As Douglass North observed, "the 'reality' of a political-economic system is never known to anyone, but humans do construct elaborate beliefs about the nature of that 'reality'—beliefs that are both a positive model of the way the system works and a normative model of how it should work."<sup>167</sup> The case of urban housing ownership studied by this paper provides support for North's assertion. Since the establishment of the People's Republic of China in 1949, urban home

167. DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 2 (2005).

ownership, as with other property rights, has gone through dramatic changes—from private to public and then back to private ownership again. Underlying these changes are various ideological beliefs to which the Communist-led government subscribed at different times.

In its first three decades, the government faithfully practiced Marxism. Consequently, abolition of private property was on the top of the government's agenda.<sup>168</sup> Following a Soviet model, the government implemented Marxism in every aspect of social and economic life. Private land was confiscated and landlords were either imprisoned or executed. Even though the government briefly allowed private ownership of urban housing for pragmatic reasons, it quickly claimed private housing as an obstacle for building the socialist economy. In the late 1950s, the government began the so-called socialization movement with a goal to eliminate the private economy. During that period, private housing owners were forced to lease their houses at reduced prices set by the government.

By the late 1960s, when the "Cultural Revolution" broke out, private home ownership ceased to exist. By using formidable means, the government carried out massive appropriations of private property without compensation and due process. The lawless takings inflicted serious injustice, but it did accomplish the government's purported goal: transforming private ownership to public ownership. Apparently, the justification for the takings was Marx's assertion that public ownership was superior to private ownership. Public ownership was the very basis of a planned economy, which was perceived as the only way to maximize productivity. After the transformation, the government was the sole source for urban housing. Public ownership did not increase productivity. The government fell far short of achieving its goal of providing free housing for everyone. The allocation system was neither fair nor efficient. Further, the government experienced severe financial constraints because of the housing expenditure. All of this proved that the public housing system was a complete failure.

The second overhaul of the property institution took place in the late 1970s, when Deng Xiaoping initiated economic reforms. These

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168. KARL MARX, *THE COMMUNIST MANIFESTO* (1954). "[T]he theory of the Communists may be summed up in the single sentence: Abolition of private property."



changes were based on the belief that public and private ownership were not mutually exclusive. Drawing from the experience of developed economies, Deng was convinced that private ownership could facilitate economic growth more than public ownership. In order to reach a broad consensus, Deng launched a public campaign—"finding truth from facts." During the campaign, Deng articulated his famous "Cat Doctrine" (a cat is good if it catches mice no matter whether it is black or white). The implication of the Cat Doctrine was that the line between private ownership and public ownership was no longer a necessary one. The ideological shift from Marxism to *Marketism* (or *GDPism*) heralded a new era in China. Subsequently, the People's Congress made a series of constitutional changes that gradually recognized the legal status of private property. Against this backdrop, the government began urban housing and land reforms.

As previously discussed, the housing and land reforms resulted in a unique limitation in that homeowners do not own the land underneath their houses. The driving force for the land reform is the government's desire to attract foreign investment and profit from the sale of land use rights. The impact of the land reform on housing reform, however, has been tremendous. The result of the reform is the separation of land use rights and land ownership. After the reform, individuals are able to purchase not only houses, but also the use rights of the land on which their houses stand for up to 70 years. Although the state still retains land ownership, the land reform has greatly facilitated real estate transactions, and motivated individuals to invest in the real estate market. Another impact of the land reform is that it has also opened up opportunities for developers to obtain land use rights for commercial development. Since land resources in China are extremely limited, commercial development is usually carried out in populous residential areas. As a result, the allocation of land use rights between private property protection and commercial development has become a controversial issue. The government, however, is not well prepared for the conflict with private ownership and economic development. Only a few years into the reforms, new homeowners found that their properties were obstacles in the way of economic development. In the unbalanced tug-of-war between individual homeowners and deep-pocketed developers, the

government sided with the latter by changing zoning plans to fit commercial development, authorizing forced evictions, deploying judicial police to execute eviction orders, lowering compensation standards, instructing courts not to hear cases involving demolitions, blocking class actions, etc.

After decades of communist ideological influence, social disapproval of strong private ownership still prevails. The deep-rooted prejudice against private ownership explains why conservative scholars strongly resisted the very first Property Code. While the National People's Congress was about to pass the Property Code after over a decade of preparation, Dr. Gong, a constitutional law Professor at Beijing University, published his influential (his opponents say notorious) open letter claiming that the Property Code that would recognize the protection of private ownership seriously violates the basic constitutional principle on public ownership.<sup>169</sup> Because of Gong's accusation, the Congress put the deliberation of the law on hold for one year.<sup>170</sup> The Code was finally passed in March and took effect in October 2007. Only with this background in mind can one fully understand the reason why ordinary private owners are facing enormous difficulties in asserting their legitimate rights. In case of confrontations between individual homeowners and deep-pocketed developers, the government has consistently sided with the latter.

Applying *GDPism* to eminent domain, the government gives full backing to commercial real estate development. In order to attract investment, increase economic growth, and improve national image, the government narrowly construes administrative costs as the sheer costs for developers. The value of private property is consequently left out of the equation. In the absence of a system of enforceable

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169. Article 6 of the Constitutional of China provides: The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production, namely, ownership by the whole people and collective ownership by the working people. The system of socialist public ownership supersedes the system of exploitation of man by man; it applies the principle of 'from each according to his ability, to each according to his work.'

170. See ZHANG FENGJUAN, GUOJIA SUOYOU QUAN ZHUTI FENXI [AN ANALYSIS OF STATE OWNERSHIP], available at [http://www.honglaw.com.cn/Article\\_Show.asp?ArticleID=15108](http://www.honglaw.com.cn/Article_Show.asp?ArticleID=15108).

property rights, the costs of economic development unfairly shift to powerless private owners.